Appeal No. 2011AP2482

Cir. Ct. Nos. 2002SC13843
2008CV3324
2009CV19545

WISCONSIN COURT OF APPEALS
DISTRICT I

WISCONSIN AUTO TITLE LOANS INC.,

PLAINTIFF,

V.

KENNETH M. JONES,

DEFENDANT,

PERNELLA KING,

INTERVENOR,

PETER J. BILDSTEN SECRETARY, WISCONSIN DEPARTMENT OF FINANCIAL INSTITUTIONS.,

INTERVENING-PARTY.

FILED

FEB 5, 2013

Diane M. Fremgen
Clerk of Supreme Court

KATIE WAGNER,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN AUTO TITLE LOANS, INC. AND COMMUNITY LOANS OF AMERICA, INC.,

DEFENDANTS-APPELLANTS,

PETER J. BILDSTEN SECRETARY, WISCONSIN DEPARTMENT OF FINANCIAL INSTITUTIONS.,

INTERVENOR-PARTY.

GERONE BROWN,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN AUTO TITLE LOANS, INC.,

DEFENDANT-APPELLANT,

PETER J. BILDSTEN SECRETARY,
WISCONSIN DEPARTMENT OF FINANCIAL INSTITUTIONS.,

INTERVENING-PARTY.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Curley, P.J., Fine and Kessler, JJ.

Pursuant to WIS. STAT. § 809.61 (2011-12)[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for review and determination.

ISSUES

1) Is an order denying a motion to compel arbitration immediately appealable as a "final" order under WIS. STAT. § 808.03 or the Federal Arbitration Act?

2) If an order denying a motion to compel arbitration is immediately appealable, is the trial court's order in the instant case—which determines that the arbitration clause at issue is unconscionable—contrary to the recently-decided ***AT&T Mobility LLC v. Concepcion***,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

131 S.Ct. 1740 (2011), and ***Cottonwood Financial, Ltd. v. Estes***, 2012 WI App 12, 339 Wis. 2d 472, 488, 810 N.W.2d 852 (***Cottonwood II***)[2] cases?

BACKGROUND

The protracted nature of this case puts it in the running to be the next *Jarndyce v. Jarndyce*.[3] The original case, ***Wisconsin Auto Title Loans v. Jones***, Milwaukee Circuit Court No. 2002SC013843, was filed more than a decade ago, and in 2005, this court affirmed the trial court's order denying Wisconsin Auto's motion to compel arbitration, *see* ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2005 WI App 86, ¶1, 280 Wis. 2d 823, 696 N.W.2d 214 (***Jones I***). In 2006, the Wisconsin Supreme Court affirmed, concluding that the arbitration clause in the loan contract was unconscionable. *See* ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶33, 290 Wis. 2d 514, 714 N.W.2d 155 (***Jones II***). Thereafter, the case was consolidated with the claims of Katie Wagner, Pernella King, and Gerone Brown,[4] who—like Jones—borrowed money against their car titles and sought relief against Wisconsin Auto for, among other things, "hidden loan costs," "common law unconscionability," unconscionable sales and practices in violation of WIS. STAT. § 425.107, misleading sales practices in violation of

[2] We refer to ***Cottonwood Financial, Ltd. v. Estes***, 2012 WI App 12, 339 Wis. 2d 472, 488, 810 N.W.2d 852 as "***Cottonwood II***" because it is the second ***Cottonwood*** case to be decided by this court. The first, ***Cottonwood Financial, Ltd. v. Estes***, 2010 WI App 75, 325 Wis. 2d 749, 784 N.W.2d 726 ("***Cottonwood I***") was vacated and remanded for reconsideration in light of the United States Supreme Court's decision in ***AT&T Mobility LLC v. Concepcion***, 131 S. Ct. 1740 (2011). *See* ***Cottonwood II***, 339 Wis. 2d 472, ¶2.

[3] We refer to the landmark case described in Charles Dickens' *Bleak House*.

[4] Jones, Wagner, King, and Brown are hereafter referred to as "the consumers."

WIS. STAT. § 100.18, and deceptive insurance solicitation. The consumers' claims arose from Wisconsin Auto's policy of seeking sales of high-cost loans coupled with memberships in the "Continental Car Club" … "causing them to be caught in … [a] debt trap."

The issue before us concerns the trial court's denial of Wisconsin Auto's most recent motion to compel arbitration. Arguing that the United States Supreme Court's decision in ***Concepcion*** invalidated the bases for the supreme court's finding of unconscionability in ***Jones II***, Wisconsin Auto again moved in 2011 for an order compelling Wagner and Brown to arbitrate their cases as required by an arbitration clause in the loan contracts. The trial court denied Wisconsin Auto's motion, concluding that the arbitration clauses were unconscionable under Wisconsin law, and further concluding that the United States Supreme Court's decision in ***Concepcion*** did not compel a different result. The trial court made an extensive oral ruling. It considered ***Concepcion*** and concluded that while the court "cannot invalidate an arbitration clause by defenses that apply only to arbitration or derive their meaning solely from the fact that an agreement to arbitrate is at issue," ***Concepcion*** did not automatically overrule all of the consumers' unconscionability assertions. The court then proceeded to explain why it found that there was: (a) a very high level of procedural unconscionability; and (b) some substantive unconscionability. Wisconsin Auto now appeals.

DISCUSSION

Issue 1: Is an order denying a motion to compel arbitration immediately appealable as of right as a "final" order under either WIS. STAT. § 808.03(1) or the Federal Arbitration Act?

Wisconsin Auto argues that the order denying its motion to compel arbitration is an appealable final order. It argues that the order is "final" under WIS. STAT. § 808.03(1); in the alternative, it argues that the FAA preempts the application of WIS. STAT. § 808.03 to deny immediate review of orders denying arbitration.

Wisconsin Auto first argues that the order is final under WIS. STAT. § 808.03(1) because it concerns a "special proceeding." Under § 808.03(1), a final order is an "order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding…." Wisconsin Auto contends that an order denying a motion to compel arbitration is a special proceeding because it shares important characteristics with other motions that have been held to be special proceedings. Wisconsin Auto cites motions for contempt and motions to intervene as examples. Like these proceedings, reasons Wisconsin Auto, a motion to compel arbitration could be filed as a separate action under WIS. STAT. § 788.03.[5] Wisconsin Auto thus concluded that because the

[5] WISCONSIN STAT. § 788.03 provides:

> The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration may petition any court of record having jurisdiction of the parties or of the property for an order directing that such arbitration proceed as provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made as provided by law for the service of a summons. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same is in issue, the court shall proceed summarily to the trial thereof. If no jury trial is demanded, the court shall hear and determine such issue.

(continued)

inquiries above are separate from the case to be arbitrated, they are exactly like other motions we treat as special proceedings. Wisconsin Auto further argues that courts in other states have held that a motion to compel arbitration initiates a "special proceeding." It points to cases in Nebraska and Washington as examples. *See* ***Webb v. American Emp'rs Group***, 684 N.W.2d 33, 41 (Neb. 2004) ("denial of a motion to compel arbitration is a final, appealable order under Nebraska law because it affects a substantial right and is made in a special proceeding"); ***Stein v. Geonerco, Inc.***, 17 P.3d 1266, 1268 (Wash. App. 2001) ("a motion to compel arbitration invokes special proceedings under [Washington law], possibly setting up a mini-trial on the existence or validity of an arbitration agreement, even if there is no action on the merits").

In the alternative, Wisconsin Auto argues that even if orders denying a motion to compel arbitration are not immediately appealable under WIS. STAT. § 808.03, they are still immediately appealable because the FAA preempts our state's finality statute. As examples, it cites ***KPMG LLP v. Cocchi***, 132 S. Ct. 23, 26 (2011) ("when a complaint contains both arbitrable and nonarbitrable claims, the [Federal Arbitration] Act requires courts to 'compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the

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> Where such an issue is raised, either party may, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue to a jury summoned and selected under [WIS. STAT. §] 756.06. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

result would be the possibly inefficient maintenance of separate proceedings in different forums'") (citation omitted), and ***Concepcion***. Wisconsin Auto reasons that denial of immediate review of orders denying arbitration is an "obstacle" to arbitration that conflicts with the Federal Arbitration Act.

Wisconsin Auto also argues that, as a practical matter, denial of immediate appeal "destroys the purpose of arbitration" because "if an order denying arbitration is not immediately reviewed on appeal, an erroneous arbitration order could be shielded from review because after a case had proceeded through trial, retrial of the case later … is … expensive and wasteful."

The consumers, in contrast, argue that the order denying the motion to compel arbitration is not a final order under WIS. STAT. § 808.03. They argue that the order denying arbitration is not a special proceeding because it does not run its course completely independently of the underlying litigation, but rather, in this case, is "inextricably intertwined with the underlying litigation" and, if granted, the motion to compel "will serve to fragment issues in the litigation and complicate the merits of the existing action, creating substantial risk of conflicting rulings as important legal claims are split into competing forums." The consumers argue that the Nebraska and Washington cases cited by Wisconsin Auto are not relevant to Wisconsin because neither state has a "final order" rule equivalent to WIS. STAT. § 808.03(1). They additionally cite to cases in numerous other states that treat orders on motions to compel arbitration as non-final.

The consumers additionally argue that the law of the case establishes that the order denying arbitration is a non-final order. According to the consumers, this court already established that the order at issue was nonfinal when it ruled on Wisconsin Auto's 2009 WIS. STAT. § 808.03 appeal. The consumers further

contend that the recent cases of ***Concepcion*** and ***Cottonwood II*** did *not* change the law of the case.

The consumers also argue that WIS. STAT. § 803.03 is not preempted by the Federal Arbitration Act because it allows parties like Wisconsin Auto to apply for permissive appeal. *See, e.g.*, ***Leavitt v. Beverly Enters., Inc.***, 2010 WI 71, ¶2, 326 Wis. 2d 421, 784 N.W.2d 683 (holding that supreme court had jurisdiction to consider petition for review involving trial court order compelling arbitration). According to the consumers, the difference between Wisconsin law and ***Concepcion*** is that in ***Concepcion*** there was a categorical rule holding that any arbitration clause that banned certain class actions was per se unconscionable. But in Wisconsin, we determine the issue on a case-by-case basis. *See, e.g.*, ***Cottonwood II***, 339 Wis. 2d 472, ¶5 ("'Unconscionability is an amorphous concept that evades precise definition.'") (citing ***Jones II***, 290 Wis. 2d 514, ¶31).

In Wisconsin, the finality of orders regarding arbitration appears to be an open question. The law for many years was that an order compelling arbitration was not appealable. *See* ***Teamsters Union Local No. 695 v. County of Waukesha***, 57 Wis. 2d 62, 67, 203 N.W.2d 707 (1973). The supreme court recently revisited that rule in ***Leavitt***, *supra*. ***Leavitt*** arose when this court dismissed an appeal from an order compelling arbitration on the ground that the order was not final and denied a petition for leave to appeal that same order. ***Id.***, 326 Wis. 2d 421, ¶¶12-13. The aggrieved party petitioned for supreme court review. ***Id.***, ¶14. The respondent argued that the supreme court lacked jurisdiction to grant the petition, citing the rule that orders compelling arbitration are not immediately appealable. ***Id.***, ¶¶3, 14. The supreme court discussed the rationale underlying that rule and concluded that it "no longer reflects Wisconsin's approach to appellate jurisdiction." *See* ***id.***, ¶39. The supreme court did not

replace the rule with a new rule, but instead, concluded that it "need not decide here whether appeal of a [trial] court order compelling arbitration is a permissive appeal or an appeal as of right." ***Id.***, ¶5.[6] Indeed, the courts have not had to confront this issue directly because we have, when the circumstances warrant it, granted petitions for leave to appeal orders denying arbitration. *See*, *e.g.*, ***Coady v. Cross Country Bank***, 2007 WI App 26, ¶1 n.1, 299 Wis. 2d 420, 729 N.W.2d 732 (granting petition for leave to appeal).

This issue is likely to recur, however, and we consequently request the guidance of the supreme court as to whether an order denying a motion to compel arbitration is immediately appealable as of right as a "final" order under either WIS. STAT. § 808.03(1) or the Federal Arbitration Act, or if it is instead merely permissive under § 808.03(2). *See* ***State v. Jennings***, 2002 WI 44, ¶19, 252 Wis. 2d 228, 647 N.W.2d 142 ("[T]he court of appeals may … certify to this court a case that presents a conflict between a decision of this court and a subsequent decision of the United States Supreme Court on a matter of federal law.").

Issue 2: If an order denying a motion to compel arbitration is immediately appealable, is the order in the instant case—which determines that the arbitration clause at issue is unconscionable—permitted under the Concepcion and Cottonwood II cases?

Wisconsin Auto argues that the order denying its motion to compel arbitration must be reversed because the trial court's decision regarding both the procedural and substantive unconscionability of the arbitration clause at issue runs

[6] *But see* ***Leavitt v. Beverly Enters., Inc.***, 2010 WI 71, ¶¶59-61, 326 Wis. 2d 421, 784 N.W.2d 683 (Ziegler, J., concurring) (stating that the supreme court should decide the appealability issue and should decide that an "order denying arbitration, which requires the case to proceed in court, should be appealable as of right").

contrary to ***Concepcion*** and ***Cottonwood II***. According to Wisconsin Auto, the trial court in this case found a great amount of procedural unconscionability based upon factors that are common to consumer contracts of adhesion. But, according to Wisconsin Auto, ***Concepcion*** expressly rejected such methodology. Wisconsin Auto also contends that outside of the arbitration context, Wisconsin courts do not hold contracts to be procedurally unconscionable because they are adhesion contracts. Additionally, according to Wisconsin Auto, the grounds under which the trial court found substantive unconscionability were rejected by ***Concepcion*** and ***Cottonwood II***; specifically, that: (a) the arbitration clauses contain a class action waiver; and (b) the contracts were one-sided because granting attorney fees was optional under the arbitration clause, but mandatory under chapters 421-427 of the Wisconsin Statutes. Wisconsin Auto reasons that because there is no substantive unconscionability, there is no unconscionability as a matter of law. *See* ***Cottonwood II***, 339 Wis. 2d 472, ¶7 (requiring both procedural and substantive unconscionability).

The consumers argue that, as a threshold issue, the arbitration clause, which encompasses both the high-interest loans and their accompanying memberships to the "Continental Car Club," is unenforceable under the McCarran-Ferguson Act. Under the McCarran-Ferguson Act, insurance products are subject to Wisconsin insurance law, including the requirement that any arbitration clause must be submitted to the state insurance commissioner prior to use. *See* 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.") As insurance products, the Continental Car Club memberships should have been submitted to the state

insurance commissioner but were not. Therefore, the arbitration clauses concerning the high-interest loan and Continental Car Club memberships are per se unenforceable under Wisconsin law. The consumers also note that many courts have recognized that the McCarran-Ferguson Act preserves state insurance law predominance over the Federal Arbitration Act. *See, e.g.*, ***Love v. Money Tree, Inc.***, 614 S.E.2d 47, 47-48 (Ga. 2005); ***Allen v. Pacheco***, 71 P.3d 375, 377 (Colo. 2003); ***Standard Sec. Life Ins. Co. v. West***, 267 F.3d 821, 823 (8th Cir. 2001).

The consumers also argue that the arbitration agreement is unenforceable under Wisconsin's common law unconscionability doctrine. They argue that the trial court correctly found a "great" amount of procedural unconscionability as well as a significant amount of substantive unconscionability, and that ***Concepcion*** and ***Cottonwood II*** do not compel a different result.

According to the consumers, ***Concepcion*** does not apply to actions originating in state court and therefore should not be part of the unconscionability analysis. They explain that the Supreme Court refused to extend its holding in ***Concepcion*** to state court cases, and that Justice Thomas, who provided the necessary fifth vote in ***Concepcion***, has consistently maintained that the FAA does not apply to cases in state court. *See, e.g.*, ***Preston v. Ferrer***, 552 U.S. 346, 363 (2008) (Thomas J., Dissenting) ("As I have stated on many previous occasions, I believe that the Federal Arbitration Act … does not apply to proceedings in state courts…. Thus, in state-court proceedings, the FAA cannot displace a state law that delays arbitration until administrative proceedings are completed.") (internal citations omitted).

The consumers also argue that, even if ***Concepcion*** does apply, the trial court's decision fully comports with that case. They claim that ***Concepcion*** addressed California's rigid ***Discover Bank*** rule,[7] while Wisconsin's unconscionability analysis has no such categorical rule. They also claim that ***Concepcion*** is factually distinguishable for many reasons, including that: (a) the contract at issue there allowed either party to bring a claim in small claims court in lieu of arbitration, and (b) if the customer received an arbitration award greater than the phone company's last settlement offer, the company would be forced to pay a minimum recovery of $7500 and twice the amount of the customer's attorney's fees. *See* ***id.***, 131 S. Ct. at 1744. The consumers contend that, in contrast, in the contract at issue before us the arbitration clause does not guarantee a claimant a minimum recovery or payment of attorney's fees; in fact, it forces the consumer to pay the $125 arbitration fee in some circumstances and does not allow the consumer to choose small claims court in lieu of arbitration. The consumers also contend that ***Concepcion*** does not specifically prohibit courts from considering whether a contract is a contract of adhesion. *See* ***id.*** at 1750 n.6 ("Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.").

[7] *See* ***Discover Bank v. Superior Court***, 113 P.3d 1100 (Cal. 2005), *abrogated by* ***Concepcion***, 131 S. Ct. 1740.

The consumers further argue that the arbitration clause in this case is different from the contract in ***Cottonwood II***. In ***Cottonwood II***, the contract provided that the arbitrator could award reasonable attorney's fees if allowed by law. *See* ***id.***, 339 Wis. 2d 472, ¶20. The contract before us, on the other hand, states that the "borrower and lender shall be responsible for all their own expenses, including attorneys, experts and witnesses, unless allocated differently by the arbitrator as permitted by applicable law." (Some capitalization omitted.)

The consumers also contend that Wisconsin Auto erroneously asserts that ***Concepcion*** and ***Cottonwood II*** forbid us from considering the class-action waiver provision. According to the consumers, these cases merely held that the waiver of classwide proceedings in an arbitration clause could not, *by itself*, render an agreement substantively unconscionable. *See* ***Concepcion***, 131 S. Ct. at 1746, 1753; ***Cottonwood II***, 339 Wis. 2d 472, ¶12.

The issue of whether the arbitration clause is unconscionable concerns application of a United States Supreme Court case. The parties' arguments essentially boil down to one question—did ***Concepcion*** overrule ***Jones II***? While Wisconsin Auto asserts that "guidance is needed … to reconcile Wisconsin's law of unconscionability with ***Concepcion***," the only way we can make any rulings contrary to ***Jones II*** is if we conclude that some aspect of ***Jones II*** directly conflicts with ***Concepcion***. *See* ***Jennings***, 252 Wis. 2d 228, ¶¶3, 19; *see also* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case"). We therefore request the guidance of the supreme court.

CONCLUSION

For the foregoing reasons, we respectfully request the supreme court's guidance as to whether: (1) an order denying a motion to compel arbitration is immediately appealable as of right as a "final" order under WIS. STAT. § 808.03(1) or the Federal Arbitration Act; and (2) if the order denying a motion to compel arbitration is immediately appealable, whether the order in the instant case—which determines that the arbitration clause at issue is unconscionable—is contrary to the recently-decided ***Concepcion*** and ***Cottonwood II***.